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1 UNITED STATES BANKRUPTCY COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 Case No. 08-13555 (jmp)
4 Case No. 08-01420 (jmp) (sipa)
5 Hearing re: Adversary Proceeding 09-01062
6 Hearing re: Adversary Proceeding 10-02821
7 Hearing re: Adversary Proceeding 10-02823
8 Hearing re: Adversary Proceeding 12-01220
9 Hearing re: Adversary Proceeding 12-01045
10 - - - - - x
11 In the Matter of:
12
13 LEHMAN BROTHERS HOLDINGS, INC., et al.,
14
15 Debtors.
16
17 - - - - - x
18 In the Matter of:
19
20 LEHMAN BROTHERS, INC.,
21
22 Debtor.
23
24 - - - - - x
25

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1 U.S. Bankruptcy Court
2 One Bowling Green
3 New York, New York

6 | June 13, 2012

7 | Page

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9 B E F O R E :

10 HON JAMES M. PECK

11 U.S. BANKRUPTCY JUDGE

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1 Hearing re: Debtors' 40th Omnibus Objection to Claims.

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3 Hearing re: Second Motion for Order Approving the Trustee's
4 Allocation of Property.

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6 Hearing re: Status Conference

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8 Hearing re: Status Conference

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10 Hearing re: Status Conference

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12 Hearing re: Motions to Dismiss

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14 Hearing re: Motion to Stay

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25 Transcribed by: Sheri Monroe

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1 P R O C E E D I N G S

2 THE CLERK: All rise.

3 THE COURT: Be seated. Good morning.

4 MR. HORWITZ: Good morning, Your Honor. Maurice
5 Horwitz from Weil, Gotschal & Manges on behalf of Lehman
6 Brothers Holdings, Inc. and certain of its affiliates.

7 The first item on today's agenda is the debtors'
8 40th Omnibus Objection to Claims. This objection sought to
9 disallow certain claims that were filed after the bar date
10 in violation of this court's July 2nd, 2009 order setting
11 forth the procedures and deadlines for filing proofs of
12 claim in these Chapter 11 cases.

13 Today, LBHI is proceeding as to one claim on the
14 40th Omnibus objection, that is Claim Number 36789, which
15 was filed by West LBAG on October 5th, 2009.

16 The claim was filed 13 days after the September
17 22nd, 2009 bar date, applicable to claims other than those
18 based on Lehman program securities and should be disallowed
19 and expunged as untimely.

20 Your Honor, as this court has recognized in prior
21 decisions, the enforcement of the bar date in these cases is
22 critical. Under the present circumstances, strict
23 application of the bar date is warranted and West LB's late
24 filed claim should be disallowed.

25 West LB makes, essentially, two arguments for why

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1 its claim should be permitted even though it is late, a due
2 process argument and an excusable neglect argument.

3 For excusable neglect, West LB relies primarily
4 on the most important pioneer factor in the Second Circuit,
5 the reason for the delay and the extent to which the delay
6 was in the reasonable control of the claimant.

7 The only evidence submitted by West LB in support
8 of both arguments is the allegation that West LB did not
9 receive actual notice of the bar date. As we state in our
10 papers, Your Honor, the Second Circuit requires more than a
11 mere denial of receipt to rebut the presumption that notice
12 was received, but the only evidence that West LB has
13 submitted to support its denial of receipt is a misprint in
14 the original affidavit of service that was filed on July
15 10th, 2009 by Hugh Baer (ph) director of client services at
16 Epic Bankruptcy Solutions.

17 The original affidavit erroneously stated that a
18 copy of the bar date order had been delivered to Dusseldorf,
19 Georgia instead of Dusseldorf, Germany. However, as
20 explained in Mr. Baer's declaration that was filed
21 contemporaneously with LBHI's reply, this error only
22 occurred in the creation of the original affidavit of
23 service. The error did not occur in the actual mailing of
24 the bar date order and bar date notices.

25 The corrected affidavit of service that was filed

1 on June 3rd, 2010 by Mr. Baer indicates that the bar date
2 order and the bar date notices were sent to the correct
3 addresses for creditors located in Dusseldorf, Germany
4 including West LB.

5 With no other evidence to support its denial of
6 receipt, Your Honor, West LB has failed to rebut the
7 presumption that those notices were received.

8 In addition, the corrected affidavit of service is
9 that West LB received actual notice of the bar date in not
10 one, but three of its locations; in Dusseldorf, Germany, in
11 London and in New York. And that notice of the bar date was
12 served on West LB's counsel of record in these cases.

13 West LB also had constructive notice of the bar
14 date. As this court is aware notice of the bar date was
15 published in several international newspapers.

16 Furthermore, Your Honor, West LB's own conduct
17 indicates that it knew about the bar date. It filed three
18 other timely proofs of claim, two of which, Claim Numbers
19 30100 and 30101, were hand delivered on September 22nd,
20 2009. West LB clearly knew that these claims needed to be
21 actually received on that date as required by the bar date
22 order and it took the necessary steps to insure that they
23 were.

24 The same diligence could have been exercised with
25 respect to Claim Number 36789. Having been served in three

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1 different locations and on its counsel of record, West LB
2 cannot credibly argue that it did not receive actual notice
3 of the bar date and that due process prohibits the
4 disallowance of the its claims.

5 Due process requires that notice be reasonably
6 calculated to apprise parties of the pendency of an action.
7 Here, four notices were served in three different cities.
8 And as Mr. Baer states in his declaration, the envelope
9 containing each notice was inscribed with a legend in all
10 capital letters that stated, **LEGAL DOCUMENTS ENCLOSED**,
11 **PLEASE DIRECT TO THE ATTENTION OF ADDRESSEE, PRESIDENT OR**
12 **LEGAL DEPARTMENT**.

13 The service was reasonably calculated and complies
14 with the due process standard set forth in Melane and its
15 progeny (ph).

16 West LB's excusable neglect argument falls short
17 of the pioneer standard for the same reasons. Even if the
18 bar date order and bar date notices had not been delivered
19 to West LB's Dusseldorf's office in Germany, this court
20 could follow its prior decisions in this case with respect
21 to the late claim of Kesta DePoe (ph), the transcript from
22 that matter is attached to LBHI's reply as Exhibit B. As
23 well as the Drexel (ph) decision, in which services on
24 Barclay's offices in Connecticut, New York and Australia was
25 found to be sufficient even if notice was not served on

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1 Barclay's Headquarters in London.

2 The principle in all these matters are the same,
3 it was West LB's obligation and entirely within West LB's
4 control to route any one of the notices served in
5 Dusseldorf, New York or London to the appropriate
6 individuals within its organization.

7 Your Honor, we address each of the pioneer factors
8 in our papers. I won't go through each of them unless the
9 court wishes for me to elaborate on them.

10 THE COURT: No need.

11 MR. HORWITZ: I would just like to briefly note
12 the prejudice argument because it is an important one in
13 these cases. West LB argues that there's no danger of
14 prejudice because it's situation is unique, as every other
15 creditor has noted.

16 We've heard this argument before and as Your Honor
17 has noted prejudice can't be traced to a single claim, but
18 to the impact that one exception can have on other claims,
19 given the degree of notice that was provided in this case,
20 the impact of an exception would be substantial.

21 THE COURT: Can you describe to me what the
22 prejudice would be at this point, though. I mean, one of
23 the unusual aspects of the present contested claim matter is
24 that it's arising so late in the proceeding, I don't know if
25 that was a tactical judgment made by West LB not to file a

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1 motion seeking permission for the claim to be deemed timely
2 filed way back when or whether or not it was simply neglect
3 or whether there's some other reason. But the litigation
4 that gave rise to my decision, which is published at 433 BR
5 113 and which has been affirmed relates to a whole series of
6 somewhat comparable late claim issues presented to the court
7 and decided all at once, this is now coming much later in
8 the proceeding, after the initial distribution and after
9 confirmation, obviously.

10 So, can you recount how the Lehman Estate would be
11 prejudice today if I were to allow the West LB claim as a
12 late filed claim?

13 MR. HORWITZ: Your Honor, if this claim is allowed
14 as -- even though it's late -- even though notice was served
15 in four places, including on counsel of record, other
16 claimants could come forward filing motions seeking to have
17 their claims allowed as timely filed, although they're late,
18 regardless of how many notices the debtors served on these
19 organizations. And the debtors have creditors -- many other
20 creditors are sophisticated global organizations just like
21 West LB, some more sophisticated than others, but many
22 global organizations.

23 And taking the argument that West LB makes to its
24 conclusion, the debtors could have served West LB in every
25 one of its locations all over the world and without serving

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1 in Dusseldorf, attention to the legal department, West LB
2 would have the ability to still find claims that had
3 overlooked and file them after the bar date.

4 It's the impact that allowing this late claim
5 would have on other claims that have been filed late, that
6 may still be filed late.

7 THE COURT: Is there any way to quantify that risk
8 or is that just a theoretical proposition?

9 MR. HORWITZ: Well, there is a way to -- the
10 debtors can look at how many late claims have been -- how
11 many claims were filed after the bar date by such
12 institutions or just from Germany alone there were over
13 1,000 claims that were filed late. They are in varying
14 amounts, a lot of them are based on Lehman Program
15 Securities.

16 The amounts could -- and it's not just a dollar
17 amount, it is -- it would be the administrative burden of
18 suddenly having to deal with thousands of late claims. It's
19 also a prejudice to other creditors. This court has already
20 expunged claims that were filed untimely by other creditors
21 that are similarly like West LB, have multiple offices, that
22 have internal bureaucracies and need to be able to route
23 notices internally to individual people that deal with the
24 transactions that the debtors were involved in. If those
25 claims have already been expunged, they've been prejudiced

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1 if this claim is now allowed.

2 THE COURT: Okay.

3 MR. THOMPSON: Good morning, Your Honor. John
4 Thompson, Cadwalader, Wickersham & Taft on behalf of West
5 LB.

6 Your Honor, the debtors would have you believe
7 that this matter is about excusal neglect, at least in the
8 first instance, but it's not. It is about due process.

9 If it's about excusal neglect at all it's about
10 excusal neglect in the alternative as we argue. And this is
11 because Lehman was required to provide West LB notice of the
12 bar date in Dusseldorf, Germany in accordance with the ISDA
13 (ph) contract and it failed to do so.

14 THE COURT: Let me stop you there because I know
15 that's what your ISDA agreement provides, are you saying
16 that notice provisions in an ISDA agreement and if that
17 trumps all other appropriate notice and that it provides any
18 party to an ISDA agreement an opportunity to make the same
19 argument you're now making? Because if that's the argument
20 you're making that's the prejudice to Lehman.

21 MR. THOMPSON: I'm not arguing that, Your Honor.
22 I'm arguing that West LB in Dusseldorf, Germany was a known
23 creditor, known to the debtors --

24 THE COURT: But you got notice all over the world.

25 MR. THOMPSON: Your Honor, there is --

1 THE COURT: You got notice all over the world and
2 the institution knew about the bar date and filed claims
3 before the bar date.

4 MR. THOMPSON: Your Honor, there's a difference
5 between receiving notice at the New York branch of West LB.

6 THE COURT: Why?

7 MR. THOMPSON: Because the New York branch of West
8 LB has a separate operation and there's a reason -- the
9 specific reason for the notice provision in the contract is
10 that there is a specific and unique operation or a separate
11 operation in West LB, New York then there is in West LB,
12 Germany that is for specific regulatory reasons. They have
13 specific capital requirements, reserve requirements and,
14 indeed, all of that separateness would result in a separate
15 proceeding not unlike the one -- the proceeding before Your
16 Honor in the LBI case in this court and not impact West LB
17 in Dusseldorf, Germany.

18 THE COURT: Well, nobody's focused yet on whether
19 or not you simply lost this in Dusseldorf. Because, to me,
20 and you'll have to respond to this, seems to be a question
21 of fact as to whether notice was actually sent to
22 Dusseldorf. The fact that the original certificate of
23 service contained the blatant error of Dusseldorf, Georgia
24 and I don't know if that means Republic of Georgia or State
25 of Georgia, but it includes that fairly obvious mistake and

1 it has been corrected.

2 Assuming for the sake of this argument that the
3 notice was actually sent to Dusseldorf and that the original
4 certificate of service is simply a distraction to be ignored
5 and you lost it or failed to pay attention to it, how can
6 you possibly prevail?

7 MR. THOMPSON: That would be a different argument,
8 Your Honor. It's not one --

9 THE COURT: I know. It's a different argument.

10 MR. THOMPSON: It's not one we're making.

11 THE COURT: But, how do you make -- what is the
12 argument you're making if I accept as true the corrected
13 certificate of service?

14 MR. THOMPSON: Well, I mean, I suppose that we
15 could default to a excusal neglect standard with the
16 understanding that at least one of the factors would have
17 been predetermined and that is the reason for the delay.
18 But, I think the problem is with Your Honor's premise in
19 that there is -- if you're accepting the declaration for its
20 conclusory statement, that notwithstanding the fact that the
21 exhibits from the original affidavit of service and this
22 service list for the bar date notice were generated from the
23 exact same list of addresses, that somehow the exhibits were
24 incorrect and yet the bar date notices themselves were
25 mailed on proper envelopes, there is no explanation for that

1 contention in Mr. Baer's declaration and none is offered in
2 the debtors reply brief. In fact, there is no explanation,
3 whatsoever, anywhere for that contention and I would say
4 that at a minimum we would require an evidentiary hearing to
5 get to the bottom of that in the associated discovery and
6 deposition that would be necessary of Lehman's declarant.
7 It just can't be accepted on fact that when we know how --
8 and, frankly, they stated that it was generated from the
9 same list of addresses, that one was incorrect and one was
10 correct.

11 THE COURT: So, you're saying that you want
12 discovery?

13 MR. THOMPSON: Yes, Your Honor. At a minimum, we
14 would need it. I don't think that you need to on this
15 record. On this record we think you could find either that
16 there is sufficient facts here or sufficient questions to
17 indicate that West LB did not, indeed, receive service in
18 Germany where it was required to per contract and per its
19 due process rights or in the alternative under an excusal
20 neglect standard you could find that the claim could be
21 deemed timely filed.

22 But at a minimum, Your Honor, on this record we
23 cannot -- I don't think you can find, Your Honor, that on
24 this record there are sufficient facts to be able find that,
25 indeed, Germany got service. And when you couple that --

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1 when you couple the lack of explanation in Lehman's
2 declaration with the fact West LB provided a declaration
3 that said we didn't receive notice.

4 THE COURT: Well, that's assumed. I assume that
5 if West LB had been keeping its eye on the ball in Germany
6 since it filed timely proofs of claim with respect to other
7 claims in the Lehman case, it would have been diligent and
8 would have filed a timely claim with respect to this
9 particular ISDA.

10 It doesn't really distinguish West LB from
11 everybody else in the case who has come in claiming
12 excusable neglect, however, particularly for a global
13 financial institution, because it seems to be a case a
14 internal lack of coordination. Institutionally, West LB had
15 knowledge that there was a bar date. Institutionally, West
16 LB had knowledge of potential claims arising out of this
17 particular transaction because West LB made the affirmative
18 choice to terminate the trade. I believe it was September
19 17 that was the early termination date. Do I have that
20 right?

21 MR. THOMPSON: That's correct.

22 THE COURT: Okay. So, somebody thinking about
23 this particular trade, made a decision, knew about the
24 bankruptcy and institutionally wherever, whether it was New
25 York or some other office knew that there was a proof of

1 claim obligation, thereby, in my mind, blurring or
2 completely rebutting allegations made in Mr. Chirubens (ph)
3 declaration, well, that's not how we do business in German
4 insolvency because bar dates aren't an important factor for
5 us to consider. But so what? Why is that a defense at
6 anything here? You're late, and you knew you were late and
7 you didn't seek relief after filing the claim at a time when
8 presumably counsel knew that all manner of claimants were
9 coming into court and seeking on a timely basis, permission
10 for late filed claims. Why didn't you do that?

11 MR. THOMPSON: I'll respond to that, Your Honor,
12 and then some of the earlier comments. First, that the
13 claim was only filed 13 days late, as was noted.

14 THE COURT: I know it's only 13 days late.

15 MR. THOMPSON: Your Honor --

16 THE COURT: It's not as if we're dealing with --
17 but we're dealing with it years later.

18 MR. THOMPSON: I understand, Your Honor. There
19 was not only notice of that claim, but a guarantee
20 questionnaire was filed timely, providing the estate with
21 all the information it needed to have, right. But all of
22 the information that it would need to have to reconcile
23 these claims.

24 Indeed, there was ongoing reconciliation between
25 the parties. The objection to the claim only came in

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1 September of 2010, right? So, the parties were talking
2 prior to 2010 and after 2010 and after the objection was
3 made it was pushed. Why didn't West LB take action to seek
4 relief? Because --

5 THE COURT: Yes, that's the question.

6 MR. THOMPSON: -- because Lehman was already
7 knowledgeable about the circumstance and talking with West
8 LB on the business side, on reconciling the claim. A
9 decision was made that that was a way to have it resolved.
10 And that they didn't need to seek --

11 THE COURT: I presume nobody waived any rights or
12 remedies and that you weren't lulled into inaction as a
13 result of business discussions and that some conscious
14 decision was made to simply finesse this.

15 MR. THOMPSON: Your Honor, I can't speak to a
16 specific conscious decision to quote, "finesse it." I think
17 I've explained that there was a desire to resolve this if
18 they could do it consensually and I don't think any rights
19 were waived. I also don't think there's any prejudice here.

20 You asked counsel with respect to what the
21 prejudice would be. They haven't made substantial enough
22 distributions to be able to have a concern about needing to
23 claw back anything from other creditors.

24 We're talking about 21.5 million dollar claim and
25 while we would all love to have \$21.5 million, I'm sure,

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1 we're talking about that in comparison to an estate that has
2 582 billion dollar plus in claims against it and a matter
3 for which this court, Your Honor well knows, deals in
4 billions of dollars every day.

5 It's not -- I don't think it's a credible argument
6 to suggest that this claim, with its unique circumstances,
7 having been filed when it was, with a timely questionnaire
8 having been filed represents a prejudice to the estate.

9 To go back, Your Honor, and make sure that we're
10 clear on the transaction, Your Honor, rightly raises that
11 the ISDA was terminated, right? And all the trades under
12 it. But, Your Honor said something that suggested this was
13 -- that the was one transaction, it wasn't. There were
14 multiple transactions and they were set up at multiple
15 different branches and that is exactly why the debtors
16 provided notice or at least attempted to, at multiple
17 locations. They knew well and good that they needed to
18 provide notice, actual notice to the known creditor in
19 Dusseldorf, Germany, they just didn't do it.

20 THE COURT: But, they say they did.

21 MR. THOMPSON: But that's a material issue of
22 fact, Your Honor, that you don't, on this record, have
23 sufficient evidence to find that they did.

24 THE COURT: Well, let's just say for the sake of
25 discussion that instead of their having been a -- I'm going

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1 to call it a clerical error and if you want to re-
2 characterize it, you can do that, but it's a declaration
3 that service was made in Dusseldorf, Germany,
4 notwithstanding the fact that in the earlier certificate of
5 service appears to have Dusseldorf, Georgia as the service
6 address.

7 I'll take judicial notice that I'm not aware of a
8 place call Dusseldorf, Georgia and if there is such a place
9 I'd be interested in somebody telling me about that. So,
10 assume that it's nonsensical, that it's a nonsensical
11 certificate of service in the first instance and it's
12 replaced with the right Dusseldorf, the one that's in
13 Germany, where your client is located; isn't this all a
14 distraction? Because if the reality is that the service was
15 made in Germany, but misplaced or disregarded or ignored,
16 how does this differ from any other original certificate of
17 service that provides for service of the entire 67,000
18 claims in the case? Because the opportunism of your
19 argument relates solely, it seems to me, to the fact that
20 there was this mistake made which was corrected. So, let's
21 just say it was properly correct, how does this differ from
22 any other case in which a big institution misplaces a piece
23 of mail?

24 MR. THOMPSON: Your Honor, it's difficult to
25 distinguish it in circumstances, but I think that, again,

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1 that hypothetical, I don't think is supported or could be
2 supported on these facts.

3 Your Honor, I would just note and I think this
4 goes, at least in part, to your hypothetical, that we did a
5 sampling of -- in light of what was said in this supporting
6 declaration, we did a sampling of the original affidavit of
7 service. And this is just a random sampling of
8 approximately 200 pages, on everyone of those pages there's
9 a mistake substituting, apparently, Georgia for Germany.

10 Now, I don't disagree that that may be their
11 error, right? That the systemic error --

12 THE COURT: That's actually probative of the
13 debtors case not yours.

14 MR. THOMPSON: Fair enough. I understand that
15 point, Your Honor, and I understand that I'm making -- when
16 I'm making it that that is a risk. My point is that it
17 needs a whole lot more explanation than has been provided in
18 Mr. Baer's declaration. It hasn't been explained.

19 THE COURT: Well, in all the time that this matter
20 has been pending, both in business discussions and at the
21 level of formal pleadings, has there been any request made
22 to verify and validate the facts concerning the original
23 service of the proof of claim bar date notices in Germany?

24 And also, have you performed an internal review,
25 in effect, scrubbing the systems within West LB's mail room

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1 the way mail is dealt with that includes a legend that says
2 this is important, send it to the legal department or you'll
3 be at your own peril or whatever it said, which is basically
4 that kind of a warning.

5 Have you conducted what amounts to an internal
6 investigation as to how your own client dealt with material
7 of this sort at that time?

8 MR. THOMPSON: Your Honor, we have -- to answer
9 the second question, we have investigated or conducted an
10 investigation to determine whether there is any legend or
11 ledger to indicate that this notice was received.

12 I understood your question to get broader at the
13 end to suggest -- or to ask whether we had -- whether any
14 type of document of this sort --

15 THE COURT: Well, here is what it comes down to.

16 MR. THOMPSON: -- I note that we haven't conducted
17 that --

18 THE COURT: If we had this problem in a slightly
19 different form during the argument that took place, I
20 believe it was on February 22nd, involving an institution in
21 France that was by its own admission, through counsel,
22 particularly cumbersome in its own internal procedures and
23 the management of mail and I didn't re-read the transcript,
24 but I believe the transcript is attached as an exhibit to
25 the replied papers filed by the debtors.

1 I remember it fairly well, however because I was
2 focused on what amounts to -- I'll call it creditor systems
3 -- creditor internal procedures in dealing with mail as a
4 factor that the creditor could not rely on in saying that
5 there had to be strict application of a notice provision in
6 an ISDA agreement and the reason for it -- and it's not a
7 decision, it's simply a point of view on my part, is that I
8 can't allow the requirements of a particular institution
9 concerning notice to a particular internal mail stop, in
10 this case in Paris, to trump otherwise appropriate notice
11 procedures that are consistent with the bankruptcy rules.

12 If I follow your argument to its logical
13 conclusion several things follow, one is if you really want
14 to open up discovery you're going to end up opening up all
15 kinds of discovery that may be addressed to your own client
16 concerning the way it dealt with information received in
17 Dusseldorf. The way it dealt internally, if at all, with
18 the coordinated nature of this particular ISDA contract,
19 which by your own statement is one in which there are
20 multiple transactions involved. There may have been a
21 complete and utter failure of internal coordination. I
22 don't know that for a fact, but it seems to me that that
23 might be a subject for inquiry if we're going to get into
24 this and convert this into -- as it is now, a contested
25 matter, but one with full discovery.

1 MR. THOMPSON: Your Honor, we welcome that, we
2 have no objections to that kind of investigation.

3 THE COURT: Highly wasteful, but we can certainly
4 pursue that if that's what you wish, it's your client's
5 money.

6 MR. THOMPSON: Your Honor, we have nothing to
7 hide.

8 THE COURT: I'm not talking about whether you have
9 anything to hide, it may be that when this matter is fully
10 developed, the culpability will be on your side, not on the
11 debtors side.

12 MR. THOMPSON: Well, see, Your Honor, I don't
13 believe that's --

14 THE COURT: You welcome that opportunity, I see.

15 MR. THOMPSON: That's right. Your Honor, I would
16 just -- I would say -- Counsel, referred to over 1,000
17 claims, late claims in Germany and you have to ask yourself
18 given what we've seen and what we know --

19 THE COURT: That they were all at the Dusseldorf,
20 Georgia post office; is that what you're saying?

21 MR. THOMPSON: Well, I will tell you -- and, Your
22 Honor, I have a copy of this if you would like me to
23 approach and I will be happy to share it with Your Honor,
24 but it's not just Dusseldorf, it's a number of German
25 addresses and that affidavit seems to suggest that it is

1 limited to that city, but it's not.

2 And so all, I guess, we're saying is, there's a
3 reason for this, it's a big problem and it may have been an
4 accident, but it wasn't West LB's accident.

5 THE COURT: Well, I think part of what I'm
6 struggling with here is the distinction between what appears
7 to be a conspicuously false certificate of service and the
8 actual facts of service itself, because if the mailing as
9 reflected in the Baer supplemental affidavit was, in fact,
10 made to Dusseldorf, Germany, this is a no harm, no foul.
11 This is a situation in which the fact that there was an
12 obviously erroneous certificate was simply a distraction and
13 that the reality is, according to the supplemental
14 affidavit, that proper service was made, which means that
15 this is one of those situations where the presumption of
16 receipt trumps the allegation of, I never got it.

17 MR. THOMPSON: Your Honor, if that were true, you
18 may be right in that circumstance. But the problem, Your
19 Honor, is that on this record, with this affidavit, there is
20 insufficient explanation and I think deserved explanation.
21 We have a right to know why this happened and that it,
22 indeed, did not happen with regard to the mailing of the
23 service. It's not enough to say, as debtor suggests, that
24 publication is not.

25 It's not enough to say, as I've said earlier, that

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1 it went to another office. Service needed to be made upon
2 Dusseldorf, Germany and it's not enough to say that we got
3 the first affidavit wrong and we corrected it 11 months
4 later and made sure that it now said Germany.

5 They need to, I think, explain to the court's
6 satisfaction why the same label or the same address that
7 shows up on the affidavit of service in the first instance,
8 was not also contained on the label that went out on the bar
9 date notice. And I don't think anybody has or can testify
10 to that fact.

11 THE COURT: Okay.

12 MR. THOMPSON: Thank you, Your Honor.

13 MR. HORWITZ: Your Honor, first of all, I would
14 say that it is enough to say that service was delivered to
15 New York and London even if it wasn't delivered to
16 Dusseldorf. I think we can probably short circuit a lot of
17 what I would say in my rebuttal if I offer -- Mr. Baer is in
18 the courtroom today, he's available for cross-examination.
19 He could elaborate on what's already in his declaration and
20 he can explain how it is that he discovered the error and
21 can probably provide some more explanation as to why it
22 occurred and how he knows that even though the affidavit --
23 the original affidavit says Georgia, the corrected affidavit
24 is, in fact, correct. That is if the court believes that
25 that is a relevant fact or an important fact.

1 But, I would also point out that LBHI was not even
2 a party to this ISDA agreement. It issued a guarantee, it's
3 not bound by the notice provisions of that agreement. So,
4 LBHI provided the notice that -- the best notice it could
5 with every address that it had for West LB, yes, probably
6 based on transactions that it had engaged in with West LB.

7 I also point out that -- to the extent that West
8 LB is now saying that its New York branch is a separate
9 entity that isn't able or doesn't do business with its
10 Dusseldorf office, West LB says in Paragraph 7 of its
11 response that the Dusseldorf office learned about the bar
12 date in -- on a conference call or a conversation with its
13 New York office discussing the transactions with Lehman.
14 This is an admission that West LB knew about the bar date
15 and that it was capable of communicating the fact that there
16 was a bar date to its Dusseldorf office, if that
17 conversation had taken place before the bar date we wouldn't
18 be here.

19 THE COURT: There's no question that the New York
20 office of West LB knew about the bar date and complied with
21 the bar date and there's also no question that a
22 conversation took place -- at least that's my understanding
23 from the papers, after the bar date with the Dusseldorf
24 branch, as a result of which they scurried about and tried
25 to file the claim as quickly as they could. But what is

1 that an admission of?

2 MR. HORWITZ: To the extent that they --

3 THE COURT: Other than that the New York branch
4 was on notice and took appropriate action and the Dusseldorf
5 branch dropped the ball.

6 MR. HORWITZ: Not only that, I mean, Counsel was
7 saying that the New York branch is so separate that notice
8 to New York wouldn't be sufficient because the two offices
9 operate so separately. They clearly converse enough that, I
10 mean, we're talking about this very topic and about filing
11 claims against Lehman.

12 THE COURT: But, we actually don't know that, but
13 that may be a subject for further discovery.

14 MR. HORWITZ: Your Honor, that's -- I mean, that's
15 all I would add. The pioneer factors -- the other pioneer
16 factors other than reason for the delay generally weigh in
17 favor of the debtor. The reason for the delay, what we're
18 focusing on right now is the only one that I think is
19 important and in this case I can't see how there was --
20 there is a valid reason for the delay in filing this claim.

21 And the prejudice, as the court noted, the
22 prejudice is that a decision allowing this claim would,
23 essentially, set the bar for what it is actual adequate
24 notice of a bar date in these cases. And that could have an
25 impact, a substantial impact on the rest of these cases.

1 THE COURT: Okay. I'm going to give counsel for
2 West LB an opportunity to respond to something I'm about to
3 say.

4 As I think about this I have a hard time
5 distinguishing the West LB circumstance from other similar
6 circumstances that were the subject of the court's decision
7 reported at 433 BR 113. Particularly as it relates to large
8 organizations in which, for example, somebody in one office
9 thought that somebody in a European office was going to be
10 taking care of the particular claim filing by the bar date
11 and it just didn't happen.

12 The part of this story that I'm having some
13 trouble with is, what makes this different from all the
14 situations where I've found that the argument for excusable
15 neglect simply didn't wash and was insufficient? Because,
16 to me, the particularly difficult facts to overcome here
17 relate to the fact that the same organization took
18 appropriate action on time and that the Dusseldorf branch
19 actually knew about the bankruptcy, was on constructive
20 notice of the bankruptcy and/or was on actual notice of the
21 bankruptcy as a result of a lost piece of mail in
22 Dusseldorf.

23 Because all of this seems to be mostly about what
24 is really a distraction, the fact that there was an
25 apparently false certificate of service filed that was

1 replaced with a correct one.

2 So, why should we spend any time on discovery?

3 Why shouldn't you just simply lose?

4 MR. THOMPSON: Your Honor, it's just -- these
5 circumstances are distinguishable because one, as I've
6 noted, there is a difference and a material difference for
7 very good U.S. law and regulatory reasons between the New
8 York branch of West LB and the Dusseldorf office, right?
9 And that was recognized specifically in the ISDA contract
10 and the debtors knew that.

11 THE COURT: What was recognized in the ISDA
12 contract?

13 MR. THOMPSON: That Dusseldorf, Germany had
14 separate trade confirms, separate trades --

15 THE COURT: But that was with Lehman Brothers
16 Finance, SA.

17 MR. THOMPSON: Yes, and it was supported by the
18 guarantees from LBHI on each one of those underlying trades.

19 THE COURT: Okay. But, the argument that was just
20 made by counsel for the debtors is that what we're talking
21 about here is a guarantee claim against LBHI. How does
22 anything in the ISDA with the counter party require LBHI in
23 its capacity as a party with potential guarantee liability,
24 how does that limit their ability to provide generalized
25 notice, including notice by publication in international

1 newspapers?

2 MR. THOMPSON: First, because the contract says so
3 and second, because --

4 THE COURT: But, it's not a contract with LBHI.

5 MR. THOMPSON: It is, Your Honor. They provided
6 that guarantee, they are a party to the contract.

7 THE COURT: Well, they may have provided the
8 guarantee, but they're not a party to the -- as far as I
9 know, to the specific notice provision and even if they were
10 for reasons that I said earlier, how can an ISDA notice
11 requirement trump a general requirement of notice in a
12 international bankruptcy case?

13 MR. THOMPSON: Your Honor, the general requirement
14 that we should be dealing with here is the due process
15 requirement is articulated by the Supreme Court. Right? I
16 mean, it's not a bankruptcy --

17 THE COURT: In what respect are you claiming the
18 denial of due process, really? Are you claiming a denial of
19 due process because you have a bank officer who is able to
20 say, I never saw the proof of claim bar date notice? Is
21 that it?

22 MR. THOMPSON: Your Honor, that is part of it.
23 But the other part of it is, there is not a substantial
24 evidentiary record on the part of the debtors that sets
25 forth with sufficient reasons the explanation for why the

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1 original affidavit had a wrong address and why that same
2 wrong address wasn't reflected in the actual bar date
3 notice, which would have rendered the actual notice
4 ineffective, as a matter of fact.

5 And when you know, and they did know who the
6 actual notice party is to be and we know that why? Because
7 we look at the affidavit of service, both the original one
8 and the amended one and West LB in Dusseldorf is recognized
9 along with all of the other offices, why? Because that's
10 what the contract provides. The debtors know it. It's an
11 admission against their own interest with respect to that
12 affidavit.

13 And what Melon v Central Hanover Bank says at 339
14 US 306, as well as, City of New York v New York New Haven
15 and Hartford Railroad Company at 344 US 293, they both say
16 that when you have an actual party and you know what the
17 address is, you send it to that party -- that's -- they have
18 to do it, it's required. It is a due process requirement.

19 THE COURT: They say they did it. They say they
20 did it.

21 MR. THOMPSON: But, Your Honor, we don't know
22 that.

23 THE COURT: And Mr. Baer is here, if you want to
24 ask him about it.

25 MR. THOMPSON: And, Your Honor, I will speak to

1 that. We asked if this was an evidentiary hearing, the
2 answer was no, today it's an evidentiary hearing, not fair,
3 right? We heard about this on Friday through Mr. Baer's
4 testimony.

5 I know Mr. Baer, I like Mr. Baer, I'm happy to
6 have Mr. Baer testify, but not today.

7 THE COURT: Fine. We'll have him testify another
8 day. The parties will confer about any discovery that may
9 be an appropriate part that hearing, it will be scheduled
10 for the next Omnibus hearing date in the afternoon.

11 MR. THOMPSON: Thank you, Your Honor.

12 THE COURT: And given the nature of this it could
13 also be scheduled for a claims date depending on which is
14 most convenient for the parties.

15 MR. THOMPSON: Thank you, Your Honor.

16 MR. HORWITZ: Thank you, Your Honor. The next
17 item on the agenda is a status conference with respect to
18 the allocation motion in the LBI proceeding. I'll turn the
19 podium over to whoever wants to speak. Mr. Graulich. Oh,
20 the counsel for the Trustee, I'm sorry.

21 THE COURT: Right.

22 MR. WILTBURG: Good morning, Your Honor. David
23 Wiltenburg, Hughes, Hubbard & Reed for the SIPA Trustee.

24 The next item on the calendar is a status
25 conference with respect to the Trustee's second motion

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1 relating to allocation of property of the estate and as the
2 court is aware this is a process that, in effect,
3 establishes the customer estate which is a critical step in
4 a SIPA case.

5 Since the status conference we had with Your Honor
6 last month, the parties have proceeded on a couple of
7 different fronts. First, I think I'm able to report that
8 the parties -- the principle claimants and the trustee have
9 reached agreement with respect to a number of significant
10 items that are set forth in the Trustee's second allocation
11 motion and even to the point of agreeing on language for a,
12 in effect, a stipulated order that would allocate on current
13 value approximately 15 billion to the customer estate.

14 The proposed order on that has been shared with
15 other interested parties, that is to say, parties who have
16 expressed a desire to be kept informed and they have -- will
17 have an opportunity to comment and hopefully we will be able
18 to submit that, in effect, agreed order to the court by the
19 end of this week.

20 THE COURT: What will that agreed order provide?

21 MR. WILTBURG: Essentially, it will deal with
22 the items that are denominated in the second allocation
23 motion as the core customer property category consisting of
24 securities and cash that were, in effect, set aside by LBI
25 for customers under the applicable SEC regime. And it will

1 cover enumerated compliance failures, that is situations
2 where property should have been set aside for the benefit of
3 customers, but was not.

4 And so it's in total about six of the ten or so
5 items that are enumerated in the second allocation motion
6 that will be, in effect, resolved by this order.

7 There was also a discussion at our chambers
8 conference last month of setting forth bench marks, that is
9 a kind of calendar for discussions and the continuation of
10 the due diligence process to a conclusion. The parties have
11 exchanged proposals on that and I can report that we're
12 pretty close, although have not finalized, but in the
13 meantime that's not been an obstacle to continued due
14 diligence efforts with respect to the non-agreed items, the
15 items that still remain open. And so it's our anticipation
16 that that process -- that we will agree on a kind of
17 calendar of dates that are -- will bring the process to a
18 conclusion, but in the meantime we will also continue the
19 process of exchanging information and getting closer,
20 hopefully, to agreement on the open items.

21 THE COURT: Is that your whole report?

22 MR. WILTBURG: Well, essentially -- and I guess
23 the last thought that it's -- you know, we think it's
24 helpful to the process to have dates such as today's date,
25 that, in effect, provide their own kind of benchmark for the

1 parties to shoot for and try to get to a point where
2 something concrete can be reported to Your Honor.

3 THE COURT: Mr. Wiltenburg, you're very skilled at
4 providing information in a way that's somewhat opaque. It's
5 not clear to me as a listener what has been accomplished,
6 can you be more specific?

7 MR. WILTENBURG: Yes, Your Honor. On the core
8 customer property issue the Trustee's motion included an
9 affidavit by one the Trustee's financial professionals that
10 set forth the securities, the value of the securities that
11 were, in fact, set aside for the benefit of customers
12 pursuant to applicable SEC rules. And that body of
13 securities, which, you know, on the latest valuation is
14 approximately 10 billion, forms part of what we are terming
15 core customer property.

16 In addition, under the applicable SEC regime, LBI
17 was required to set aside cash corresponding to cash
18 obligations owing to customers and that is the reserve
19 account that, you know, gained fame in the Baclay's
20 litigation and elsewhere. And it is that body of property
21 plus accretions, cash accretions that in one instance result
22 from distributions with respect to the body of customer
23 securities that were held by the estate and in other cash
24 items that the parties have agreed are fairly allocable to
25 the customer estate.

1 And that combination of items, the securities and
2 cash comes to about 13 billion of the 15 billion that I
3 mentioned.

4 And in addition to that, there are several
5 identified items were either LBI did not hold in secure
6 custody customer securities thereby violating the SEC rule
7 or in its calculation of the reserve amount, included debits
8 that were not appropriately included and thereby reducing
9 the lock up, the cash lock up. And so those items totally
10 approximately 2 billion have also been agreed among the
11 parties.

12 THE COURT: What does this mean in terms of an
13 interim distribution and what would the timing be of such a
14 distribution?

15 MR. WILTBURG: Your Honor, it is, of course, an
16 essential step in doing an interim distribution and, again,
17 aspirationally, we're hoping and have, I think, the
18 intention to make an interim distribution whether this
19 summer or in the fall.

20 THE COURT: Okay. Do you have anything more to
21 report?

22 MR. WILTBURG: Your Honor, I think that's about
23 it and as I said, we believe it's helpful to the process to
24 have dates such as today's occasion to, in effect, provide a
25 goal for the parties.

1 THE COURT: Okay. Is there anyone else who wishes
2 to say anything at this time?

3 MR. KOBAK: Your Honor, James Kobak, Hughes,
4 Hubbard & Reed. I think -- I had some discussions with the
5 Trustee yesterday that Mr. Wiltenburg may not be completely
6 current on. It is our intention to make an interim
7 distribution. If we can get this amount confirmed it will
8 enable us to do that. So, we are hopeful that this order
9 will be entered.

10 And obviously, if we could allocate some more
11 property or reach agreements with other parties we could
12 make even a more robust interim distribution. But we have
13 been working very hard on figuring out what form that would
14 take and I'm confident that we will be before Your Honor
15 with a motion before the end of the summer certainly as to
16 how we propose to do it, what the amount of it would be and
17 so forth.

18 THE COURT: Okay.

19 MR. KOBAK: Thank you, Your Honor.

20 MR. GRAULICH: Your Honor, Timothy Graulich of
21 Davis Polk & Wardwell on behalf of LBIE. Just by way of
22 supplementation and perhaps a small nuance to Mr.
23 Wiltenburg's comments.

24 As Your Honor is aware, LBIE and LBHI have been
25 working together cooperatively with the Trustee in an effort

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1 to -- to really do two things, to achieve a floor for an
2 allocation that would help facilitate an interim
3 distribution and we think that a allocation as described by
4 Mr. Wiltenburg would hopefully be sufficient for those
5 purposes.

6 And the second goal is to defer and perhaps
7 eliminate a contentious -- potentially contentious and time
8 consuming dispute with respect to some of these other open
9 items, while the parties continue to the same process that
10 got us to this resolution to try and resolve the balance of
11 the issues. All the while, trying to preserve parties
12 rights with respect to valuation issues and distribution
13 issues. So, I think that the order -- at least the version
14 of the order that I have reviewed, I think achieves that,
15 but I did want to just note the fact that there is at least
16 one or two open issues with respect to the order. We've
17 been work very productively with Hughes Hubbard and I trust
18 that we'll be able to resolve those, but I just wanted to by
19 way of nuance, just indicate that the order isn't entirely
20 agreed, but the devil is in the details when you're talking
21 about \$15.7 billion there's no small issues, but I think
22 we're very close.

23 THE COURT: Great. Anything from anybody else?
24 Apparently so.

25 MS. COHEN: Your Honor, Hollace Cohen, Troutman

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1 Sanders on behalf of Jason J. Wallace who was a customer of
2 LBI. We were an objectant in connection with the second
3 allocation motion and I'm only up here to say that we have
4 not yet had an opportunity to review the proposed revised
5 allocation motion or the allocation order and we look
6 forward to receiving it. Thank you.

7 THE COURT: Okay.

8 MR. DASH: Good morning, Your Honor. Andy Dash,
9 Brown Rudnick on behalf of Providence Equity Partners. We
10 have had a preliminary look at the proposed order. We have
11 issues with it that we're working through. I just wanted to
12 note to the court that the process of the second allocation
13 motion has our objection deadline set, at this point, based
14 on the views of the estate, at the end of June. We're
15 hoping to work cooperatively, but we can't necessarily
16 promise that we're going to be in a position by the end of
17 this week, that has been suggested, to agree to the terms of
18 the proposed order, but we're going to work towards that end
19 if we can.

20 THE COURT: Okay.

21 MR. DASH: Thank you.

22 MR. HEMM: Good morning, Your Honor. Robert Hemm
23 of Covington & Burling on behalf of Joy Global, Inc. Joy
24 Global also holds a customer claim. Mainly, in respect of
25 its own stock, which is was repurchasing through the Lehman

1 Brokerage and on which is has been paying post filing
2 dividends for some three and a half years now.

3 We also received a draft of the revised proposed
4 order late yesterday and there's some language in the order
5 that addresses the legal status of the post filing dividends
6 under SIPA, a matter that as Your Honor may recall was the
7 subject of some dispute in connection with the first
8 allocation order and that was essentially tabled until such
9 time as it was clear whether there was, in fact, going to be
10 a short fall in customer property.

11 We will be reaching out to the Trustee's counsel
12 with respect to the language and just wanted to respectfully
13 ask that, to the extent that we're unable to reach an
14 agreement with Trustee's counsel with respect to the
15 language, that the post include that we have an opportunity
16 to be heard on the matter and we'd just like to reserve our
17 rights on that. Thank you.

18 THE COURT: There's something about this process
19 that's making people want to speak, I'm not really sure why.

20 MR. DORCHAK: Good morning, Your Honor. Joshua
21 Dorchak, Bingham McCutchen on behalf of Elliott Management
22 Corporation. I just wanted to add our name to the list of
23 others who have received a copy of the proposed order and
24 are looking at it and haven't yet agreed with its terms.

25 THE COURT: Okay. Just to be clear on something.

1 If anybody is in the courtroom who's in the position of
2 either having seen the order and not having yet had an
3 opportunity to comment or not having seen the order and
4 wanting an opportunity to comment, everybody will have an
5 opportunity to participate in this process who is affected
6 by it.

7 And if the proposed order is not fully consensual,
8 no doubt, there will be a hearing with respect to all of
9 this, at some appropriate time on notice.

10 MR. CAPUTO: Thank you, Your Honor.

11 THE COURT: You're welcome. Mr. Krasnow, do you
12 have anything to add?

13 MR. KRASNOW: Your Honor, I do not.

14 THE COURT: Well then, I have something to say to
15 you. I have heard through the grapevine that you are very
16 close to retiring from the practice of law. And I wanted to
17 wish you well and tell you that it's been a pleasure having
18 you appear in this court in this case. And I hope that
19 retirement and all the things that you do gets you a great
20 deal of pleasure and satisfaction.

21 MR. KRASNOW: Thank you, Your Honor. I really do
22 appreciate the Court's comments, however, I cannot help but
23 think of a line, I think it was in the Godfather about
24 someone trying to leave and being brought back in. So, it
25 may well be, Your Honor, that at least with respect to one

1 matter in Lehman, that I've been spending a fair amount of
2 time, that relates to LBI that I will not be able to fully
3 withdraw, but thank you very much. I appreciate it.

4 THE COURT: Okay. Okay. Is there anything more?

5 (no verbal response)

6 THE COURT: We're adjourned then.

7 (Whereupon these proceedings were concluded at
8 11:09 AM)

9 *****

10 PROCEEDINGS

11 THE CLERK: All rise.

12 THE COURT: Be seated, please. Good afternoon.

13 Let's proceed. Don't all speak at once.

14

15 MS. LEMMER: Good afternoon, Your Honor. Elisa
16 Lemmer from Weil, Gotshal & Manges on behalf of Lehman
17 Brothers Holdings, Inc. and Lehman Brothers Bank FSB. I'm
18 also joined by colleague, Lauren Zerbinopoulos and our
19 client representative, Joelle Halpern.

20 Would, Your Honor, like appearances in all of the
21 matters pending or should we proceed with the status
22 conference on the Turnberry Fountainebleu matters.

23 THE COURT: I had, in my mind, treated them as --
24 related.

25 MS. LEMMER: Understood. There's another matter

1 on the agenda which is why I asked the question.

2 THE COURT: Let's just deal with the, the
3 Turnberry related matters.

4 MS. LEMMER: No problem. Your Honor, at the
5 conclusion of the status conference, excuse me, -- at the
6 conclusion of the status conference --

7 THE COURT: We may need to call a microphone
8 specialist on that one.

9 MS. LEMMER: (Laughing) I'll do my best to fix
10 it.

11 THE COURT: I think it may be that it's unscrewed
12 and it needs to be turned into its base.

13 MS. LEMMER: Okay. There we go. Thank you, Your
14 Honor. At the conclusion of the status conference that took
15 place in March before Your Honor, my colleague, Mr.
16 McCarthy, had advised the Court that the parties agreed on a
17 mediator from JAMS, Judge Crane, for which they would meet
18 with and attempt to mediate their disputes.

19 I'm pleased to report that the mediation did take
20 place. The parties met here in New York for a mediation
21 that spanned two days in mid-May. But, unfortunately, the
22 parties are not close to settling at this point. After
23 consideration, the client believes that it is - it's in the
24 best interests of all of the parties here to request a
25 ruling from this Court on the motions to dismiss that were

1 argued in February.

2 THE COURT: Okay.

3 MS. LEMMER: A motion to dismiss will have -- a
4 ruling on the motions to dismiss will have a dual effect,
5 Your Honor. I think it will help frame the issues going
6 forward and it will also help streamline any potential
7 settlement discussions that the parties do have in the
8 future. In the event, however, that the parties aren't able
9 to reach a settlement, then, of course, that would enable
10 the cases to move forward at a faster pace and, as Your
11 Honor had observed at the previous status conference, these
12 cases have been aging for a while. So we think, Your Honor,
13 we would respectfully request that the Court issue a ruling
14 on the motions to dismiss and then a related discovery order
15 which I believe Your Honor had indicated would flow
16 following the rulings.

17 THE COURT: All right.

18 MS. LEMMER: Thank you, Your Honor.

19 MR. MEISTER: Good afternoon, Your Honor. Stephen
20 Meister, Meister, Seelig & Fein, for Turnberry, Jackie and
21 Jeffrey Soffer in the non-Lehman parties in these related
22 adversary proceedings.

23 Your Honor, I would, would respectfully submit
24 that the mediation, which did take place, was -- I have a
25 more optimistic view than does counsel, who I don't think

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1 was there for at least all of the time, the two days. The
2 second day was quite productive -- a very substantial offer
3 was made. I don't regard the parties as terribly far apart
4 and I do think that -- there's reason for cautious optimism
5 that the case will settle.

6 I would like to apprise the Court that, after the
7 conclusion of the second day, there were many people, there
8 were scheduling issues -- we had agreed upon a third day --
9 this is before Judge Crane11 -- we had also delivered
10 substantial financial information during the course of the
11 mediation, or prior to the mediation, and the third day was
12 unilaterally terminated by the Lehman side, who, at that
13 time, said they did not have a sufficient opportunity to
14 digest the additional information that my clients had
15 provided.

16 But, there was substantial progress and, as I
17 said, I, I do think, I do think settlement is hopefully
18 within grasp.

19 Your Honor, I wanted to --I've spoken to my client
20 about the motions because we had reason to believe there
21 would be this request to decide them. And, I'd, I'd like to
22 do what I hope the Court will find helpful. I,I think that
23 we can, we the Turnberry parties, can offer to stipulate to
24 prongs of the motion to dismiss that is before Your Honor so
25 that Your Honor then does not have to deal with those and

1 make a decision on those.

2 So, just briefly, in the Town Square -- there is
3 the Town Square Complaint and then there are two complaints
4 by Lehman. There is a Town Square complaint by Turnberry
5 and then there are two complaints, one related to the senior
6 loan at the Fontainebleu and one related to the mezzanine
7 loan at the Fontainebleu and then Turnberry parties have
8 answered and counterclaimed with respect to both of those
9 Fontainebleu complaints.

10 Going to Town Square, the Turnberry complaint
11 lists four causes of action -- a fraudulent inducement
12 claim, a breach of contract claim that the ninety-five
13 million dollar bridge loan was not fully funded and a
14 promissory estoppel claim based on the -- commitment that
15 was issued with respect to the six hundred twenty-five
16 million dollar take-out financing at Town Square and an
17 unjust enrichment claim.

18 The Lehman parties have moved to dismiss the
19 first, third and fourth claims. We would offer to stipulate
20 to the dismissal of the fraudulent inducement claim, the
21 first claim. That's the only claim that is grounded in the
22 so-called repo 105 transactions that Your Honor had
23 commented on in the oral argument.

24 THE COURT: I recall my comments.

25 MR. MEISTER: Right. Moving to the, to the

1 Fountainebleu complaint, as I said, there's one related to
2 the mezzanine loan and one related to the senior loan.
3 They're substantively identical. The Lehman parties assert
4 three breach of contract claims related to three different
5 guarantees, a limited payment guarantee, a non-recourse
6 carve-out guarantee and a completion guarantee and a fourth
7 unjust enrichment claim. And, the -- in each case the
8 Turnberry parties have counterclaimed for fraudulent
9 inducement similar to the fraudulent inducement claim in the
10 Town Square, similarly based on the repo 105 financial
11 representations and an unjust enrichment claim.

12 So, following a parallel path, we would offer to -
13 - we would offer to stipulate to the dismissal of the
14 fraudulent inducement which is count one in both of the
15 answer and counterclaim documents filed -- pleadings filed
16 by the Lehman parties. Hopefully, that assists the Court.

17 I did want to add, Your Honor, that -- one
18 important point that I, I think is not before the Court on
19 the motions to dismiss, is that in the Fountainebleu part of
20 the dispute, which is the lion share monetarily, the claims
21 are unquestionably grounded on a guarantee, or guarantees,
22 whereas in the Town Square, the -- Jacqueline and Jeffrey
23 Soffer are makers to the ninety-five million dollar -- I'll
24 call it the bridge note.

25 The guarantees contain a burn down provision that

1 allows the liability, or provides that the liability of the
2 guarantor reduces, pursuant to certain milestones. I, I
3 simply bring this to the Court's attention because separate
4 and aside from the affirmative or offensive claims that
5 Turnberry has asserted, one of which has now been dismissed
6 by stipulation, in each of the loans at issue in
7 Fontainebleu, there is a, a defense based upon Lehman's
8 alleged prevention of the conditions to the reduction of
9 liability similar to -- it, it's actually a condition
10 precedent except instead of to the formation of a contract
11 to the reduction of liability under a contract and that
12 defense is not subject to any dismissal motion because none
13 of the affirmative defenses has Lehman moved to dismiss.
14 And, so, I only bring this up because I think it is
15 significant and it, it won't be addressed, no matter how you
16 decide the balance of the motions.

17 So, we would, we would like to leave today with a
18 direction, if we can get one, to resume the negotiations
19 because, as I said, a very substantial offer was made and we
20 are optimistic that the matter can be resolved and we'd love
21 to do that and relieve Your Honor of the burden.

22 THE COURT: I like that message. But it takes two
23 to tango. As far as the stipulation with regard to
24 fraudulent inducement claims, in the pleadings, I think that
25 is very helpful particularly because it should make it much

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1 easier for the parties to develop an acceptable discovery
2 stipulation concerning scope and also duration. One
3 question I have, and this is really for Lehman, at this
4 point, I'm assuming this is not the first time, although it
5 could be, that you've heard a proposal such as this. If it
6 is the first time, are you in a position to respond to it?
7 And, given that Mr. Meister's clients, through him, express
8 a desire to move forward with settlement discussions without
9 further ado, is Lehman willing to do that in good faith?

10 MS. LEMMER: Thank you, Your Honor. It is the
11 first time that we hear of this proposal to stipulate to
12 dismiss the fraudulent inducement claims. We did speak with
13 counsel for the Turnberry parties, Soffers, earlier, a few
14 days ago, and this was not part of the conversation. We're
15 happy that they are stipulating to dismiss those claims but
16 we would still ask the Court respectfully to issue a ruling
17 on the remaining claims that are the subject of the motions
18 to dismiss. We feel that --

19 THE COURT: Let's just say I did that.

20 MS. LEMMER: Yes.

21 THE COURT: How does that advance the ball?

22 MS. LEMMER: I think it frames --

23 THE COURT: Let's just say I ruled against you
24 with respect to the motion to dismiss.

25 MS. LEMMER: Under--

1 THE COURT: How are you helped?

2 MS. LEMMER: Understood, Your Honor. I think it
3 frames for both of the parties what remaining claims they
4 must tackle either in the litigation going forward or
5 through settlement. Part of the issues, and I'll, I'll get
6 back to the mediation because some points were made about
7 the mediation that I wasn't --

8 THE COURT: I don't want to know anything about
9 what went on in the mediation.

10 MS. LEMMER: Okay. Understood. Generally, Your
11 Honor, I think it helps parties, when they mediate, to
12 understand what claims remain viable or potentially viable.

13 THE COURT: Let me disagree with you. It-- you
14 should assume for purposes of the mediation, particularly
15 one that already has a mediator in place and that has had
16 several days of mediation under the belts of the parties,
17 that they -- mediation is designed to resolve disputes that
18 could be litigated. And the parties, especially well
19 advised parties, have the ability to factor into their
20 decision-making some weighted risk assessment as to what
21 could happen in litigation. Because a motion to dismiss, by
22 its very nature, is interlocutory and does not definitively
23 resolve the claims that had been made--

24 MS. LEMMER: Uh-huh.

25 THE COURT: -- I don't see how an expedited

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1 determination of matters that are presently before the Court
2 on the motion to dismiss actually changes anything with
3 respect to mediation assuming that the parties are willing
4 to mediate. Part of my problem with the presentation I'm
5 hearing is that I hear from Mr. Meister a sense of relative
6 optimism. I hear from you a sense of relative pessimism.

7 MS. LEMMER: Uh-huh.

8 THE COURT: I can't tell whether or not I'm being
9 gamed --

10 MS. LEMMER: Uh-huh.

11 THE COURT: --by either or both of you. And it
12 bothers me. Because ordinarily in, when parties have
13 engaged in mediation in good faith, they come to a settled
14 view that's not based upon posturing as to whether or not
15 ongoing mediation actually can be productive. Have you and
16 your client come to a settled view that it is no longer
17 productive to engage in mediation absent some win with
18 respect to a pending motion? Because, if that's what this
19 is about, I am not inclined to play into your hand.

20 MS. LEMMER: Understood, Your Honor. And that it
21 not the case.

22 THE COURT: Well, I, I, I understand why you would
23 deny that. But, I'm very concerned about what's going on
24 here.

25 MS. LEMMER: Let me frame --

1 THE COURT: Because I'm not inclined to grant any
2 motion to dismiss while there is a reasonable prospect for
3 parties to get to yes and to get to yes by acting
4 reasonably.

5 MS. LEMMER: Understood, Your Honor. And that's
6 why, if Your Honor would allow me to frame some of the
7 points that Mr. Meister made concerning the mediation, the
8 third day of mediation, I think that would enable the Court
9 to understand --

10 THE COURT: I do not want to hear anything about
11 the substance of the mediation. That's not why I'm here.
12 I'm here to deal with whether or not it would be productive,
13 truly productive, to move into what will be expensive and
14 burdensome discovery, or whether it would be productive for
15 the parties to get back to the table. Are you telling me
16 that the answer is you would rather spend estate money
17 litigating?

18 MS. LEMMER: No, Your Honor. I'm not saying that.
19 What I'm saying --

20 THE COURT: What are you saying?

21 MS. LEMMER: I'm saying that the parties are not
22 close. That --

23 THE COURT: So what?

24 MS. LEMMER: -- the optimism --

25 THE COURT: So what? Get close.

1 MS. LEMMER: The, the optimism expressed by Mr.
2 Meister is not shared by us because of the vast differences
3 that, in, basically settlement numbers, Your Honor.

4 THE COURT: Let me tell you that that happens in
5 every mediation. Get closer, get back to the table. See me
6 in a month. I'm not ruling until I hear further from you
7 concerning the third or fourth or fifth days of mediation
8 before your agreed mediator. And both parties need to be
9 reasonable. The fact that Mr. Meister has voluntarily
10 withdrawn claims that, to me, when we argued this, seemed to
11 be most problematic, suggests to me that you should be able
12 to get back to the table, refocus and get to yet. And, if
13 you can't, we can litigate.

14 MS. LEMMER: May I make a request, Your Honor?
15 Respectfully. Lehman has always been willing to have
16 conversations, have mediations with the Turnberry parties.
17 What we would like is, when we are dealing with each other
18 that we continue to deal with each other in good faith and
19 provide information. One of the key obstacles in getting
20 closer is the ability to receive and evaluate all of the
21 necessary information that Lehman would need to evaluate
22 whether it can get closer.

23 So, the request that I would make -- it's more of
24 counsel for the Turnberry parties, but I make it in open
25 Court is that, to the extent that we are talking and we're

1 willing to talk, that parties are providing that information
2 to enable them to move closer.

3 THE COURT: I assume the parties who are engaged
4 in good faith bargaining will share the necessary
5 information so that their positions can be understood. And,
6 it's hardly a request that I need to rule on. What kind of
7 information are you talking about?

8 MS. LEMMER: Your Honor, we have requested
9 financial information and we're beginning to receive some;
10 but we need to evaluate it and receive more in-depth
11 information -- and on a timely basis, too. That would
12 enable us more carefully to evaluate the requests that are
13 being made of Lehman.

14 THE COURT: None of this makes sense to me because
15 you're talking in generalities. I don't know what the
16 problem is. I'm not in a position to mediate the mediation.
17 And I don't intend to. I'm here to preside over litigation
18 that is already unduly expensive and protracted. And I am
19 directing you, and your client, to sit down within the next
20 thirty days, and I believe that you should work through the
21 problems. If there are obstacles to evaluating proposals,
22 the mediator is in a position to guide the process. And, if
23 he is not doing an effective job, get yourselves another
24 mediator.

25 MS. LEMMER: Understood. Thank you, Your Honor.

1 THE COURT: I'll see you in thirty days for a
2 status report.

3 MR. MEISTER: Thank you, Your Honor.

4 MS. LEMMER: Thank you, Your Honor.

5 THE COURT: By that, I mean the next Lehman
6 adversary date. I don't know if it's thirty days, or
7 twenty-seven days.

8 MS. LEMMER: Ok.

9 THE COURT: And, if you need an adjournment
10 because it would be a waste of time for you to come in, you
11 can have an adjournment assuming the process is moving
12 forward. If there is a true breakdown in the ability to
13 process this in mediation, I would like notification in
14 advance of the next hearing, so that I can rule from the
15 bench, with respect to the pending motions to dismiss. I
16 need some advance notice and I would expect at least a week.

17 MR. MEISTER: Thank you, Your Honor.

18 MR. WIN: Good afternoon, Your Honor. Zaw Win,
19 Weil, Gotshal & Manges for Lehman Brothers Holdings, Inc.
20 The next matter on the agenda is the debtors and several
21 other parties' motions to dismiss in the adversary
22 proceeding Williams Pate v. Lehman Brothers Holdings, Inc.
23 That's case number 12-01220. As the Court may recall, on
24 May 18th at a status conference, or, excuse me, on May 18th,
25 this Court entered a briefing order which established June

1 4, 2012 as the deadline for plaintiff to respond to the
2 debtors, or to the motions to dismiss filed by the debtors
3 and the other defendants.

4 The briefing order was served on the plaintiff at
5 all of her known addresses by overnight mail. No responsive
6 pleadings were filed by that date or thereafter. Therefore,
7 Lehman Brothers Holdings, Inc. respectfully requests that
8 the Court grant Lehman's motion to dismiss the adversary
9 case with prejudice.

10 THE COURT: Has anybody had any contact with the
11 plaintiff?

12 MR. WIN: We have not, Your Honor.

13 THE COURT: Does anybody have a contact address or
14 telephone number for the plaintiff?

15 MR. WIN: We have the contact addresses that the
16 plaintiff included in her complaints and, to some extent,
17 the plaintiff controls how we communicate with her by the
18 contact information that she provides us on her public
19 filings. And so those are the addresses that we've
20 consistently used when we've filed everything that's come up
21 in this case.

22 THE COURT: One of the things that's troublesome
23 about this case is that, in effect, the plaintiff has filed
24 a pro se complaint against the debtor and non-debtor parties
25 but has done nothing since then to prosecute the litigation

1 or to manifest an intention of proceeding with the
2 litigation. I've reviewed some of the materials that are
3 attached to the Lehman motion to dismiss which includes the
4 series of bankruptcy filings for this plaintiff in Georgia.
5 Has anybody attempted to reach out to the Chapter 13
6 Trustee, parties in that bankruptcy to endeavor to find out
7 what's going on with this individual? And, that's question
8 one. Question two, at the last hearing, it's my
9 recollection that you expressed some uncertainty as to
10 whether the property was even still the debtor's property
11 because the foreclosure may have proceeded. Do you know
12 what the status is with respect to the subject property?

13 MR. WIN: Answering your questions in reverse
14 order, Your Honor. Just to be clear. The property at issue
15 in the foreclosure action is not the debtors' property. The
16 debtors have no interest in this property.

17 THE COURT: I realize that. It's the plaintiff's
18 property.

19 MR. WIN: That's correct. As, As I --

20 THE COURT: And I believe that the plaintiff has
21 brought this litigation, no matter how you style the
22 allegations, in an effort to protect that property from
23 seizure, foreclosure in Georgia. And, that I, without
24 reading too much between the lines, this appears to be a
25 somewhat desperate last ditch attempt to try to retain

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1 possession of that property. That's how it appears to me.
2 I don't know what the fact is. That's just a conclusion
3 reached from a review of the complaint. So, that's the
4 property I'm asking about. Do you know if it's still her
5 property or if it's been taken?

6 MR. WIN: As I understand it, and counsel for
7 Aurora can correct me if I'm wrong, but she remains in
8 possession of the property. Aurora, as the servicer, has
9 filed an action for a writ of possession in Georgia state
10 court which the plaintiff is, or in the process of, or has
11 sought to remove to the district court in this district,
12 which action I think was transferred to the bankruptcy
13 court. The action that I'm speaking of has a different case
14 number. It's case 12-03662.

15 THE COURT: And what is that litigation?

16 MR. WIN: To be honest, Your Honor, it's, it's a
17 little bit difficult to tell. But what it looks like the
18 plaintiff has done is taken the possessory action from the
19 county court in Georgia and filed a motion to-- to remove it
20 to the district court here. And when she did that, she took
21 the caption from this adversary proceeding and slapped it on
22 the front of those pleadings. And, I guess it was initially
23 assigned to one of the district court judges, Judge Presca
24 (ph), and Judge Presca subsequently transferred it to the
25 bankruptcy court. And, as far as I can tell, that's as far

1 as we've gotten with that action.

2 THE COURT: Do you know when that happened?

3 Because I'm not familiar with this.

4 MR. WIN: It looks like the beginning of May.

5 THE COURT: All right.

6 MR. WIN: And, then, with respect to Your Honor's
7 first question, we have not reached out to the Chapter 13
8 Trustee. But given the actions that the plaintiff has taken
9 with respect to the dispossessory action, it seems likely
10 that since she still resides at that property, that she has
11 been receiving all of the pleadings and filings in this
12 case.

13 THE COURT: Ok. Well, all of the defendants appear
14 aligned in stating that the plaintiff's pro se complaint
15 under applicable pleading standards fails to state claims on
16 which relief can be granted. And, alternatively, seek
17 abstention. Do the parties, recognizing that there is
18 alternative relief sought, have any preference as to whether
19 or not the litigation is dismissed or whether the Court
20 simply abstains?

21 MR. WIN: The debtors would prefer that the action
22 was dismissed -- primarily because this second -- we'll call
23 it the removal action -- which, again, we're still looking
24 at because we were not parties to the original litigation so
25 it's unclear the extent to which we will or are -- will be

1 involved in the removal action. But, we think that a
2 dismissal would be more useful for resolving the second
3 action in an efficient and inexpensive manner.

4 THE COURT: Now, since I'm not familiar with the
5 pleadings in the action that has been removed and,
6 apparently assigned here, although it's not part of today's
7 agenda, I'd be interested from the parties who are actually
8 involved in that litigation, if there is any position taken
9 with respect to whether the pending litigation should be
10 dismissed or whether or not I should abstain.

11 MR. ZACHARDA: Thank you, Your Honor. Andrew
12 Zacharda on behalf of Aurora Bank FSB.

13 THE COURT: Please come to the, the actual podium,
14 if you will.

15 MR. ZACHARDA: Thank you. Aurora, like Lehman
16 Brothers, would prefer that this action, case number 12-1220
17 be dismissed rather than abstain -- rather than Your Honor
18 abstain from hearing it. There's ample reasons why the
19 complaint fails to state a claim in this particular action.
20 And, to the extent that there would be any harm to the
21 plaintiff in this action, she is already raised similar
22 issues in the case that is also pending. And, if I can
23 clarify, procedurally, what has happened with this other
24 case.

25 It appears that, in Georgia. Aurora commenced a

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1 dispossess action in county court in Forsythe County. At
2 some point in time, the plaintiff, in this case, Ms.
3 Williams-Pate, attempted to remove that action to this
4 district court and that was given a district court number, a
5 district court docket number -- that counsel recited
6 previously. That was referred over by order of reference by
7 Judge Presca and it became adversary proceeding number 12-
8 1678 on this Court's docket. And, so far the only thing on
9 the docket in that case is the actual adversary case and
10 that was entered on the docket on May 31st of this year.

11 THE COURT: And who are the defendants in that
12 litigation?

13 MR. ZACHARDA: That's where it gets a little more
14 difficult to give what should be a very simple answer.
15 According to the docket sheet, the defendants are identical
16 to the defendants in this action. But, I believe that is
17 due to the fact that the plaintiff, Ms. Williams-Pate
18 appended a full copy of the instant adversary complaint on
19 top of her removal papers. The only parties to the action
20 pending in Forsythe County, Georgia, are Aurora and Ms.
21 Williams-Pate. So, for that reason, I think perhaps the
22 clerk's office in the southern district, which had a, the
23 exact same caption information on its docket, merely took
24 the front page of what was filed and, for some reason, all
25 of the same parties on that pleading are listed as

1 defendants in the other action.

2 THE COURT: This becomes a sticky problem for
3 purposes of today because even if I were to grant relief
4 with respect to the pending motions to dismiss in the
5 original adversary complaint which was filed here in the
6 first instance by Ms. Williams-Pate, there would still be a
7 pending litigation that, at least nominally, involve the
8 very same parties and you would find yourselves presumably
9 taking appropriate action to try to extricate yourselves
10 from that litigation or to dismiss that litigation.

11 The fact that I'm now learning about this other
12 administrative complication, or procedural complication now
13 leads me to question whether, in the interests of case
14 efficiency, it might be preferable, and I'm simply asking
15 the question, to defer entry of any orders in reference to
16 the first adversary proceeding until after issue has been
17 joined with respect to the second adversary proceeding so
18 that the series of related orders can then be entered
19 adjudicating both.

20 Now, I don't know whether or not, as I say this,
21 it is more sensible to do this sequentially since plaintiff
22 has notice in bold print of the briefing schedule applicable
23 to today's hearing -- in which case, since no opposition has
24 been lodged, I can dismiss the pending litigation, which
25 would then enable the defendants in the apparently

1 mislabeled second litigation to seek relief including
2 dismissal or some modification of the pleading in order to
3 remove yourselves as defendants from an action in which the
4 only actual defendant is Aurora. Doesn't help you, standing
5 at the podium. But, at least it gets the other parties who
6 are apparently improperly named out of that litigation.

7 I'm speaking literally as I'm thinking the issues
8 through. I assume the parties have, themselves, given this
9 more thought.

10 MR. ZACHARDA: Well, I would assume that I've
11 given it more thought because I've been aware of it for
12 longer. I'm not sure that I've come up with a, a better
13 result than what Your Honor has been contemplating from the
14 bench.

15 To the extent that Lehman Brothers and McCurdy &
16 Candler are, at least, nominal parties in the new action,
17 the allegations are identical to, to the extent that there
18 are allegations, because it's a full complete copy of the
19 instant adversary proceeding stacked on top of the removal
20 of the Forsythe County action. So, I would imagine that a
21 similar motion would be brought in that new action by those
22 parties because the allegations are one hundred percent
23 identical. The only thing that the new action adds that is
24 not present in the instant adversary proceeding, is the
25 removal of the dispossess action from Forsythe County,

1 Georgia and, in that instance, Aurora would argue more
2 towards abstention because there is an ongoing proceeding
3 and she does have an avenue to seek whatever relief she may
4 seek in Forsythe County against a non-debtor party and have
5 that proceed in the appropriate forum rather than in the
6 middle of a complex Chapter 11 case in New York.

7 MR. JOSE: If I may, Your Honor. For the record,
8 Dennis Jose, Gross, Polowy, Orlans representing McCurdy &
9 Candler. Judge, I see the Court's concerns. I', I'm
10 thinking of it from a totally different perspective which
11 would be that of the Georgia courts and how they would have
12 to deal with this going forward. It is my humble
13 suggestion, again I'm open to suggestions from all sides, is
14 that the Court perhaps administratively join both cases and
15 everyone has an opportunity to either make a motion to
16 remand the, the eviction action from this Court back to
17 Georgia, or, otherwise defend their positions. And, and, a
18 single order, or a single series of orders, on more or less
19 the same date dealing with both cases be rendered such that
20 we can have one single game plan that we can pass on to the
21 lower courts, rather than multiple orders at, at various
22 times -- which sometimes have, I've done a substantial
23 amount of work in state courts, complicates matters for them
24 because they don't understand the procedures here. But,
25 again, I'm open to suggestions.

1 THE COURT: Well, it certainly does seem to be a
2 procedural mess and it's fairly clear to me from having
3 reviewed the pleadings in adversary 12-01220 that the
4 bankruptcy court is not the proper forum to adjudicate
5 whatever claims Ms. Williams-Pate may have against the
6 defendants. Inasmuch as Lehman Brothers Holdings, Inc. has
7 no connection to the subject matter of the litigation, and,
8 according to the pleadings that have been filed by Lehman,
9 gave up whatever interest it had years before the bankruptcy
10 was commenced. The litigation as a result has no connection
11 to the debtor or its property and is also framed in a
12 fashion that it is difficult for a court to make
13 intelligible sense out the relief being sought. That may be
14 because the plaintiff is acting pro se and perhaps adopting
15 legal conclusions and legal jargon as a means to fill the
16 page. It does not make much sense to me as a I read it.

17 One thing that does make sense to me, however, is
18 that the plaintiff, as an individual, is seeking relief in
19 reference to her principal residence located in Georgia --
20 and has a series of complaints apparently designed to
21 prolong her period of ongoing occupancy, notwithstanding the
22 fact that she has no equity in the property. It is apparent
23 from the various schedules appended to the Lehman motion to
24 dismiss that by plaintiff's own acknowledgement in papers
25 filed in her separate bankruptcy cases in Georgia, that she

1 is upside down with respect to the amounts owed to the
2 secured creditors and has no equity in the property by a
3 substantial margin.

4 I am assuming, but don't know, that that is what
5 motivates this litigation. One thing is clear, however,
6 this litigation has nothing to do with the debtor or its
7 creditors and the allegations that have been made against
8 McCurdy & Candler, LLC and Aruora Bank FSB appear to be
9 claims that can just as easily be prosecuted, if not more
10 easily prosecuted, in the Georgia state courts. For that
11 reason, given the fact that notice of today's hearing has
12 been given to the plaintiff and she has not responded, I
13 would be inclined, were it not for the fact that we have the
14 complication of another related proceeding, to grant the
15 motion to dismiss rather than to abstain. I am not going to
16 enter that relief today, however, because I believe it would
17 be, frankly, better for all parties for there to be a clean
18 and final disposition of all of the litigation that appears
19 to have been improperly brought in this Court so that it can
20 be disposed of in a single series of orders or in a single
21 order on the same date.

22 I would suggest that one or more of the defendants
23 seek to administratively join these two proceedings so that
24 they can be heard at the same time. Restate or renew the
25 motions to dismiss in the separate litigation with such

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1 additions that may be appropriate for Aurora Bank, inasmuch
2 as Aurora Bank appears to be the subject of separate
3 allegations in the litigation that was originally brought in
4 state court in Georgia. And, that we relist both the
5 pending motions to dismiss and the to be filed motions to
6 dismiss with proper notice having been given to the
7 plaintiff, so that the plaintiff can, in effect, have what
8 amounts to a second bite at the apple in being able to
9 oppose the motions to dismiss, inasmuch as the very same
10 arguments will be made this time in a shadow proceeding. If
11 Ms. Williams-Pate does nothing after proper notice, I would
12 be inclined to grant the motions to dismiss and not abstain
13 without prejudice so that the plaintiff can proceed in a
14 proper state court forum.

15 The same result would be realized if I were to
16 abstain but I believe that that would leave the litigation
17 in both instances in limbo and would be less clear for all
18 the parties, including the plaintiff.

19 The suggestion that the litigation might be
20 remanded to the state court is another alternative that the
21 parties might want to consider. But dismissal without
22 prejudice probably leads to the same outcome.

23 MR. WIN: A practical question, Your Honor. As
24 far as a briefing schedule for the combined adversary
25 proceeding, would we need to then schedule a status

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1 conference following the combination of the two proceedings
2 to establish that or is that something that we can take care
3 of at this hearing?

4 THE COURT: I think that, in recognition of the
5 legal expense which is being churned out on account of this
6 individual's activities, it would be desirable to avoid
7 anybody having to make a separate trip down to bankruptcy
8 court just to schedule the briefing and I would propose that
9 that be done now. And, everybody can, in effect, look at
10 their respective calendars. The one problem being that we
11 don't have the other adversary proceeding listed for today's
12 hearing and that the plaintiff is not present.

13 In the context of trying to expedite a resolution
14 and save expense and, perhaps also reach a consensual
15 outcome, assuming that were possible, inasmuch as the
16 plaintiff is involved with Aurora in state court litigation,
17 I have to presume that Aurora's Georgia counsel has had some
18 contact, one way or the other, with Ms. Williams-Pate. I
19 would suggest that, through Aurora, which is the common
20 principal link, between adversary 12-01220 and the one that
21 has been brought into the district court and referred to me,
22 that we use that as a means to communicate with the
23 plaintiff and to see whether or not the plaintiff would
24 voluntarily agree that the litigation can be brought in a
25 Georgia state court, advising her that the bankruptcy court

1 is inclined to order that.

2 If she is unwilling to do that, counsel might
3 identify, with her, an agreed briefing schedule. If she is
4 unwilling to agree to a briefing schedule, or if it's not
5 possible to contact her for purposes of scheduling, I would
6 suggest that we have a scheduling telephone conference
7 solely for purposes of reporting on efforts to speak with
8 the plaintiff and obtain her concurrence to some sort of
9 orderly procedure for both of these adversary proceedings.
10 And, I can get a status report concerning those efforts to
11 contact her and concerning a proposed briefing schedule
12 which is both acceptable to the defendants and which
13 provides the plaintiff with a reasonable period of time
14 consistent with ordinary practice to respond.

15 She would also have the benefit of what amounts to
16 a second opportunity, to the extent that she wishes to avail
17 herself of it, to interpose objections to the currently
18 pending motions to dismiss which would otherwise have been
19 granted as unopposed.

20 MR. WIN: Thank you, Your Honor.

21 MR. JOSE: Judge, Mr. Jose. Would we have an
22 adjourned status hearing on this particular matter at this
23 point, Judge, while we get the administrative --

24 THE COURT: You can -- I think, given what's, what
25 you have to do, you probably need to put this out about

1 sixty days.

2 MR. JOSE: I agree, Judge. Would a date be
3 available at this point or should we contact chambers?

4 THE COURT: You can contact chambers and try to
5 set that up as appropriate.

6 MR. JOSE: Thank you, Judge.

7 THE COURT: And, with luck, you'll be able to work
8 this out with the plaintiff. But, I'm guessing you won't
9 have such luck.

10 MR. WIN: Thank you, Judge.

11 MR. JOSE: Thank you.

12 THE COURT: We're adjourned.

13 (Whereupon, proceedings concluded at 2:57 p.m.)

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I N D E X

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1 C E R T I F I C A T I O N

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3 I, Sheri Monroe, certified that the foregoing transcript is
4 a true and accurate record of the proceedings.

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7 **Sheri**
8 **Monroe**

Digitally signed by Sheri Monroe
DN: cn=Sheri Monroe, o, ou,
email=digital1@veritext.com,
c=US
Date: 2012.06.22 11:57:49 -04'00'

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10

11 **Veritext**

12 **200 Old Country Road**

13 **Suite 580**

14 **Mineola, NY 11501**

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16 **Date: June 15, 2012**

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